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IN THE

Supreme Court of the United States

October Term, 1961

No. 136

PIERCE FORD SALES, INC., and ELMER W. BEMIS,
Trustee in Bankruptcy,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PIERCE FORD SALES, INC., and ELMER W. BEMIS, Trustee in Bankruptcy,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To The Honorable The Justices of The United States Supreme Court:

The petitioners, Pierce Ford Sales, Inc. and Elmer W. Bemis, Trustee in Bankruptcy (herein called "Pierce" and "Trustee") pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause the 5th day of February 1962.

I. Opinion Below

The opinion of the Honorable the Circuit Court of Appeals for the Second Circuit printed in Appendix A hereto attached, pages 26-36, *infra*, is reported at 299 Fed. 2d 967 (1962).

II. Jurisdiction

The jurisdiction of the United States Supreme Court is invoked under the provisions of 28 U. S. C., Section 2101 (28 U. S. C. A., Section 1254) the judgment of the Circuit Court of Appeals was entered on 5 February 1962 by order of this Court (Mr. Justice Harlan) dated 8 May 1962, 22 May 1962 was fixed as the date within which this petition was to be filed.

III. Statutes Involved

1. Constitution, U. S. Amendment 7.

> "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. 15 U. S. C., §§1221-1225.

> "§1221. *Definitions.*
>
> As used in this chapter——
>
> (a) The term 'automobile manufacturer' shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term 'franchise' shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term 'automobile dealer' shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term 'commerce' shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between any Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith. Aug. 8, 1956, c. 1038, §1, 70 Stat. 1125.

"§1222. *Authorization of suits against manufacturers; amount of recovery; defenses.*

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount of controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith. Aug. 8, 1956, c. 1038, §2, 70 Stat. 1125.

"§1223. *Limitations.*

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued. Aug. 8, 1956, c. 1038, §3, 70 Stat. 1125.

"§1224. *Antitrust laws as affected.*

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States. Aug. 8, 1956, c. 1038, §4, 70 Stat. 1125.

"§1225. *State laws as affected.*

This chapter shall not invalidate any provision of the laws of any State except insofar as there is

a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled. Aug. 8, 1956, c. 1038, §5, 70 Stat. 1126."

3. Vermont Statutes Annotated, Title 12, Section 1072.

"§1072. *Effect of verdict and judgment.*

When a complaint contains a good count and a bad count for the same cause of action, and the fault has not been corrected, the verdict, though general, shall be deemed the finding of the jury on the good count, unless it otherwise appears. When a complaint is faulty by reason of nonjoinder of parties, or misjoinder of causes of action, and the fault has not been corrected before judgment of the verdict, such fault shall be deemed as waived, and the court shall give judgment according to the right of the cause and the matters in law."

IV. Questions Presented

A. Unconstitutional Reexamination of the Facts by the Circuit Court of Appeals

Whether or not the petitioners were deprived by the action of the Circuit Court of Appeals of their right to a jury trial.

B. Construction of the Automobile Dealer Suits Against Manufacturers Act

Whether or not the Circuit Court of Appeals misconstrued the intent and effect of the Automobile Dealers Suits against Manufacturers Act, 15 U. S. C. §§1221-1225, in holding, contrary to the verdict of the jury in the trial court, that no "bad faith" on the part of the respondent was shown.

C. Construction of Vermont Common Law of Unjustifiable Interference With Contractual Expectations

Whether or not the Circuit Court of Appeals ignored the Vermont common law of unjustifiable interference with contractual expectations in holding, contrary to the verdict of the jury, that no evidence of wrongful interference is to be found in the record sufficient to support the verdict.

V. Statement of the Case

A. Nature of the Action in the Trial Court

The complaint as amended was brought on two counts. In the first count, the petitioner Pierce alleged that it had been a dealer selling Ford products in Brattleboro, Vermont, since 1952 under a Ford franchise agreement until April 1, 1958; that in November, 1957, acting through its board of directors, it notified Ford to secure interested persons to become participating owners of the then management; that Ford promised to send to Vermont a team of experts to determine the cause of Pierce's financial problem; that counsel for Pierce, at various times, thereafter, called upon Ford for assistance in securing a sale of its business and for approval of purchasers secured by Pierce. Ford refused to provide any assistance unless and until Pierce first signed a form letter signifying intent to terminate the Franchise Agreement; that Pierce, solely because of this requirement, signified its intentions to terminate said agreement on forms submitted by Ford. Pierce had no alternative than to sign said letter of intent to terminate and that Ford violated the Automobile Dealers Suits Against Manufacturers Act, 15 U. S. C. §§1221-5 (herein referred to as the "Act") by acting in bad faith during negoti-

ations between Pierce and various prospective purchasers of its assets, and with respective purchasers of the capital stock of the individual stockholders of Pierce, and by acting in bad faith in performing and complying with the terms of the Ford Franchise Agreement.

The complaint further alleged in the first count that Ford urged and attempted to have Pierce enter into an agreement with one Calvin Cole and then with Premo F. Ratti to sell its inventory at such price to be determined by the New England Stock Control, well knowing that the inventory would be taken by the New England Stock Control at forced sale rather than going valuation. Ford knew that Pierce valued the inventory at 25 to 30,000 dollars and urged Pierce to sign said agreement, Ford had previously indicated to the prospective purchasers that the inventory was being taken at a forced sale figure and would be substantially less than the figures represented by Pierce. Pierce, upon learning that Ford Motor Company had secured this information from the New England Stock Control and that prospective purchasers had learned the inventory figure, refused to sell on said basis. Thereafter Pierce reached an understanding with one Roy Brown to acquire the capital stock of the Pierce Ford Sales, Inc., for a price of $25,000 and that said Roy Brown was agreeable to said buy-out arrangement and was ready and willing to enter into said agreement but that Ford induced said Brown not to buy the assets of or any stock in Pierce, by indicating to him that the price was too high. That Ford had approved Roy Brown as a capable dealer in automobile products and had determined that he was a man of integrity and ability but that notwithstanding this, Ford indicated to him that the purchase price was too high; that as a result of said interference by Ford, Pierce agreed to reduce the purchase price; that said Brown was satisfied with the

conditions of the new contract drawn by counsel for Pierce; that said contract was executed by Pierce, and delivered to said Brown; that said Brown indicated to Pierce his satisfaction with the proposed agreement and was wholly satisfied with the terms thereof; that said Brown took said contract to his home and indicated to his wife his satisfaction with the conditions therein. Ford then indicated to said Brown that the price was still too high; that he would have to sell a large number of automobiles immediately to make a success of the business and offered to said Brown another Ford Agency. That Pierce, as a result of Ford's act, was prevented from selling its business as a going concern and the stockholders were prevented from selling their stock in Pierce Ford Sales, Inc., resulting in the appellee's insolvency and a petition for an arrangement under the Bankruptcy Act and subsequently an adjudication in bankruptcy and the appointment of Elmer W. Bemis, as trustee.

In Pierce's Second Count, it is alleged that Ford unlawfully and maliciously and in bad faith by the acts alleged in the First Count hereinbefore referred to, drove Pierce out of business; that acts hereinbefore alleged, constituted the common law tort of intentional interference of business relations and destroyed the value of the investment of Pierce stockholders and caused the loss by Pierce of the sale of its business and the bankruptcy which followed.

Ford denied the allegations of the complaint and in answer to Count One alleged that the act upon which relief was claimed therein is based upon unconstitutional and void legislation.

The trial was held at Burlington, Vermont, between March 3, 1960 and March 16, 1960. Three of the five stockholders of Pierce had joined the plaintiff as parties.

Before submission of the case to the jury and upon motion of Pierce, the individual stockholders were dismissed as parties, thus leaving the plaintiff, Pierce Ford Sales, Inc., and Elmer W. Bemis, Trustee in Bankruptcy, as the only plaintiffs.

From the time the letter of intent was delivered by Pierce to Ford, three prospective purchasers negotiated with Pierce, and that Ford participated in all of these negotiations advising and counseling all of the said prospective purchasers. The first two prospective purchasers negotiated to buy the assets of Pierce Ford Sales, Inc., upon a valuation to be made by the New England Stock Control Company which assets were valued by Pierce, in the sum of 25 to 30,000 dollars; that in each of these instances, Ford encouraged consummation of the transaction knowing that the inventory had been appraised by the New England Stock Control Company on a forced sale basis, resulting in Pierce's withdrawal from the negotiations upon learning this fact. The third prospective purchaser, Mr. Brown, first negotiated to buy stock from Pierce, for a price wholly agreeable to him; that Ford approved of said Brown as to managerial ability and integrity but declined to approve the agreement satisfactory to said Brown for the reason that the price was too high. The second agreement provided for the sale of the stock at a lower figure; that Brown was satisfied with the provisions of the contract as drafted by counsel for Pierce, but after counseling and advising with Ford, did not sign said contract as renegotiated.

The Court submitted to the jury both the issue predicated on violation of the statutory provisions of the Automobile Dealers Suits Against Manufacturers Act, and the common law of tort of Interference with Business Relations and spelled out to the jury in detail the responsibility of Ford, in each case.

B. The Appeal to the Circuit Court of Appeals

After a two week trial in Burlington, Vermont (United States District Court for the District of Vermont, the Honorable Ernest W. Gibson, presiding), judgment was entered against the respondent, Ford, in the amount of $23,850 ($13,850 for compensatory damages and $10,000 for exemplary damages) in favor of the plaintiffs below, Pierce Ford Sales, Inc. and Elmer W. Bemis, Trustee in Bankruptcy. On 16 June 1960 the District Court entered an order denying respondent's motion to set aside the verdict, and for judgment notwithstanding the verdict, and for dismissal of Count One of the complaint on federal constitutional grounds. The respondent excepted to the action of the Court and to the failure of the trial court to grant a new trial.

The respondent appealed to the Circuit Court of Appeals for the Second Circuit, and the matter was argued 13 November 1961, and decided 5 February 1962 in an opinion printed, *infra*, as Appendix "A".

C. The Evidence Presented to the Jury

Pierce Ford Sales, Inc., was incorporated under the laws of Vermont, after Mr. Pierce had purchased the assets from Mr. Bemis, the prior Ford dealer in Brattleboro, Vermont. This was in the Fall of 1952. The purchase price paid by Pierce to Bemis was $37,500 after an inventory of parts and accessories had been taken by the New England Stock Control Company (1b).[1] After incorporation, a sales agreement was entered into with Ford which is commonly referred to as the Franchise Agreement (1b). The corporation operated at a substantial profit in the beginning, however, in the year 1954

[1] References are to pages in appendices, "b" for petitioner and "a" for respondent.

profits dropped and because of competition, profits had not been as great in 1955 (90a). As a result, Pierce contacted Ford, and one of its representatives met with him, advising various methods of improving the working capital of Pierce. Pierce wanted to sell his business instead and advised Ford who referred to Pierce a prospective purchaser named Gordon (62a). A tentative agreement was entered into between Pierce and Gordon which included the employment of New England Stock Control to make an inventory of parts and accessories on hand. Although Gordon and Pierce had tentatively agreed to terms, the negotiations were never consummated (45a). Unable to sell his business and in order to bring in more working capital, Pierce issued stock to various individuals which resulted in additional working capital (9a). Following the injection of this new capital, Pierce showed a profit in 1956. However, in 1957 and the first months in 1958, the corporation suffered a loss due to a general economic recession in the Brattleboro area, which resulted in repossession of cars which had been sold on installment basis (92a & 93a).

The closing of several local business concerns in the Brattleboro area and the consequent repossession of cars forced Pierce to use its capital to pay the balance due to the finance company for said repossessed automobiles (50a-52a).

Following numerous Board of Directors meetings, James L. Oakes, counsel, was instructed to contact Ford, which he did. Ford, in turn, promised to send to Brattleboro its team of experts to look into the situation (11b). Although numerous telephone calls were made, the experts were never sent. In November, 1957, the Directors of Pierce voted to request Ford to assist in attempting to interest some persons to join Pierce as a working partner (93a).

James L. Oakes, counsel for said Pierce, called Ford and was informed that before Ford would agree to interest some other person in the business, it would be necessary for Pierce to execute a notice of intention to terminate on a form provided by Ford (4b); that no other alternative or choice was given to Pierce and that this procedure had to be followed, no other form could be substituted and the one furnished by Ford had to be used (13b-14b). That subsequently the Directors resolved to authorize the execution of said notice of intention to terminate the dealership and the transmittal thereof to Ford, but provided that a letter indicating that the stockholders and directors primarily would be interested in obtaining a participating partner. Notice and letter were transmitted to Ford on or about the 18th of December, 1957, and stated by Plaintiff's Exhibit 10A (56a-58a).

"Dear Sirs:

"We hereby declare our intention to terminate our Ford dealership in Brattleboro, Vermont, and agree that our Ford Sales Agreement dated shall be deemed voluntarily terminated effective immediately, and without further notice, upon the fulfillment of both of the following conditions:

"1. The mutual execution and delivery by us and any person or persons of an agreement for the purchase of the assets of our above described dealership; and

"2. The execution and delivery by you of a Ford Sales Agreement, covering our dealership locality with such person or persons.

"We request that you assist us in seeking to find persons who may be interested in purchasing such assets and in entering such Sales Agreement, here-

by recognizing and agreeing that you are and shall be under no obligation to furnish or continue such assistance and that because of your legitimate concern with the character, ability and finances of dealers in your products, you have the right to decline, in your (162) discretion, to enter a Sales Agreement with any person who may be willing to agree to purchase our assets.

"We will give you prompt notice of the fulfillment of the first of the above described conditions.

"Neither this letter, nor any efforts you may make to assist us as herein requested, shall be deemed in any way to enlarge, restrict or modify either your or our rights and obligations under the aforesaid Sales Agreement either while the same remains in effect or upon the effectiveness of this or any other termination.

"Annexed hereto are certified copies of the resolutions of our Board of Directors and of our stockholders, or the written consents of the members of our partnership or association, authorizing the submission of this letter.

"Pierce Ford Sales, Inc.
"By /S/ James C. Pierce
"(President)"

The Franchise Agreement drafted by Ford among other provisions contained a statement that Ford had a legitimate interest in the capabilities and financial capacity of its dealers but does not contain any provision that Ford had the privilege of establishing the purchase price (Plaintiff's Exhibit 7) (114a & 115a). This Agreement prepared by Ford provided that any buyer could not purchase the

assets of Pierce without approval from Ford (93a). Accordingly, Oakes contacted Ford and asked for assistance in procuring a purchaser and approval from Ford and told Ford that time was of the essence (14b).

The Cole Negotiations

Following the letter of intention to terminate and the request for Ford's assistance, Mr. O'Halloran, Ford Dealer Placement Representative for the area, met with Pierce and Mr. Cole, a prospective purchaser in Brattleboro, Vermont (59a). Cole filled out a Ford Dealer application form which was accepted by O'Halloran. O'Halloran indicated that Cole would be acceptable as a Ford dealer possessing all of the necessary requisites (95a). Parties agreed on a sale of assets and that the New England Stock Control Company would make an inventory of the physical assets (96a-98a). Pierce indicated to Cole, in the presence of O'Halloran, that in his opinion the inventory would run $24,000, taken by New England Stock Control on the same basis as purchased by Pierce (183a). Mr. Cole was prepared to sign the agreement with Pierce (64a & 65a). However, in the meantime, Mr. Premo Ratti had become interested in the business (129a). As a result, Mr. Ratti, Mr. Pierce and Mr. O'Halloran went to the office of Richard E. Gale, attorney, who represented Ratti, and there a proposed contract was drawn between the parties (64a & 65a). Mr. Cole was not apprised of this meeting even though his application had been accepted by Ford and Mr. O'Halloran had indicated that Cole would be acceptable as a Ford dealer (64a). Cole was notified the following morning by a telephone call that he was no longer in the picture. As a result, Cole called by telephone, Mr. Stedman, proprietor of New England Stock Control, concerning the inventory (185a). Stedman told Cole that al-

though the inventory had not been extended, he believed it would be less than $15,000 and more than $12,000 (168a-170a). This amount being substantially less than that indicated by Mr. Pierce to Cole at the time the New England Stock Control had been suggested by Mr. Pierce and Cole. Pierce had indicated to Cole that the inventory would run $24,000 but O'Halloran for Ford had privately told Cole it might run around $8,000 (181a-182a). Following receipt of this information, Cole informed Oakes that he had been able to secure this information in advance from the New England Stock Control (186a). This matter came to the attention of Mr. Gannett, a partner of Oakes in the practice of law. No agreement was ever entered into despite subsequent negotiations with Cole (171a-173a).

The Ratti Transaction

On February 6, 1958, the day before the agreement between Cole and Pierce was to be signed, Mr. Premo Ratti became interested in the business (63a), his son, Francis, having previously discussed the dealership with Mr. Pierce and Mr. O'Halloran. Ratti met with Pierce and O'Halloran at the Pierce plant and O'Halloran informed Pierce that Ratti's extensive financial resources made him more acceptable than Cole to Ford (64a); even though Cole was acceptable to Ford, negotiations should be carried on with Ratti (65a). As a result, Pierce "just forgot about" the Cole transaction and instituted negotiations with Ratti, with the full knowledge of O'Halloran who was present throughout the negotiations (63a-66a). Pierce, O'Halloran and Ratti went to the office of Ratti's attorney, Mr. Gale, who prepared a purchase agreement using phraseology suggested by O'Halloran of Ford (66a) between Ratti and Pierce conditioned upon approval by

Ford, even though O'Halloran, as representative of Ford, had indicated that Ratti would be acceptable as a dealer to Ford (62a-64a).

In addition, Gale was to prepare a lease of real estate owned individually by Mr. Pierce and his wife which would be ready to sign the following day. The next morning Mr. Pierce called upon Mr. Kristensen, an attorney in Brattleboro, to represent Pierce Ford Sales (147a). Kristensen appeared at the office of Gale and he immediately advised Mr. Pierce not to sign the contract (148a). When Kristensen arrived at Gale's office, O'Halloran was there and Pierce said to him he wanted Kristensen to look over some papers that had been drawn by Gale (149a). Kristensen refused to look over the papers because he wanted to know more of the situation (149a). It appeared to him when he walked into the office that Pierce "was sort of in a corner," that he might become involved in a breach of contract suit with Cole and that he should call Gannett & Oakes who were more familiar with the business (148a); that Ratti was very anxious to have the contract "signed now or never." O'Halloran and Ratti both appeared to be putting the pressure on to get this deal signed right then and there and that it was this that scared Kristensen and made him back up so that he refused to let "it go through so fast" (149a). As advised by Kristensen, Pierce contacted Gannett & Oakes and was informed that Cole had already secured the figures from Stedman, the proprietor of New England Stock Control and that these figures were substantially less than Pierce believed (170a). Also, the inventory figures showed the value of the physical assets to be $27,141.33 on the basis of the previous formula used by Stedman, but that he arbitrarily reduced the total valuation to $12,983.13 by certifying that in his opinion that was the fair market value of the property (41b, 71a-73a).

Ratti had numerous other conversations with Pierce and Oakes but no agreement was ever reached, it having been established at that time that Stedman had released the figures (107a). O'Halloran returned to Boston and the figures were delivered by Stedman to him at the office of Ford even though this had been the first time that such procedure had ever been followed (70a).

The Brown Transaction

Pierce, its directors and stockholders, next began negotiations with Roy Brown who was general manager of a Ford garage in Wilmington, Vermont (110a-111a). A contract was drafted by Oakes which was fully agreeable to Brown and Pierce (108a, & 15b). Mr. Sweeney, the Ford District Sales Representative who succeeded O'Halloran in that office, came to Brattleboro March 19, 1958, following the receipt of a letter sent by Oakes (109a). Sweeney informed Oakes that Brown's character and ability made him most acceptable as a Ford dealer (110a). However, he objected to the terms of the proposed contract; told Oakes that the price was too high and told Brown that the deal was no good for him (154a). He went on to say that he would recommend to Ford the disapproval of the contract, which would result in failure of Ford to grant approval to Brown, notwithstanding that otherwise he was qualified (111a-112a). Sweeney discussed with Oakes every detail of the contract, which was satisfactory to Brown. Sweeney reiterated that the price was too high (113a); that the dealership was not so valuable and that Brown should not pay such a large sum (114a; 153a). Sweeney made his recommendations to Mr. O'Brien, Ford's Assistant District Sales Manager at Natick, who telephoned Oakes that "he could not go along with the deal" (115a-116a). As a result, and because of

Ford's objections to the price, a new contract was drawn by Oakes which called for a reduction of $5,000 in the purchase price (15b). Although Brown was satisfied with the provisions of the new contract, Ford had recommended three (3) changes. The new contract complied with the suggestions made by Ford (115a-116a). This contract was satisfactory to Brown but was made subject to approval by Ford as Ford required (116a). Sweeney again indicated that the price was too high; that the dealership was not worth it. The agreements were signed by Pierce, and Brown took them with him to his home (81a). He indicated to his wife that he was prepared to sign, that the agreements were satisfactory to him and that he was going to become a Ford dealer (283a). Brown took the agreements to O'Brien in Natick for approval, but following discussion with O'Brien, Brown called Oakes from Ford's office and told him that he would not sign the agreement (116a-117a). Oakes, on behalf of Pierce, constantly had objected to Ford's reference to the purchase price and indicated that Ford had no right to conduct itself so as to squeeze the selling dealer for the benefit of the incoming dealer and Ford (112a-116a, Plaintiff's Exhibit 17). The two agreements drafted in connected with the Brown transaction were satisfactory to Brown. Ford objected to both contracts (110a-116a); constantly advised Brown; told Brown the price was too high; that it was not a good deal for him, even though Brown was represented by very able counsel (Plaintiff's Exhibit 18). The evidence justified only one logical inference. Ford wanted Pierce to sell at such a low price assuring Ford a new dealer who would commence business upon a bargain basis which, in turn, would make it simple for said dealer to sell Ford Products, resulting in this advantage to Ford and financial loss to the retiring dealer (294a-295a & Sweeney evidence).

General

The conduct of Ford which is forbidden by the Act is, in this case virtually the same conduct actionable as a tortious interference with contractual relations. Ford, favoring the new dealer at the expense of the old, put a stacked deck into the Cole and Ratti deals. Ford O'Halloran tried to coerce Pierce into swift execution of buy-and-sell agreements with Cole, then Ratti, based on the unknown inventory figure. Ford knew that the final figure would be computed by New England Stock Control, a former Ford employee, using Ford men part time for appraisals, with a supply of Ford Motor Company envelopes (Pl. Ex. 8), who cut the appraisal almost in half of the figures he had used previously (Pl. Exs. 1-3, 14). The buyers were let in on this little game, and so were also anxious to close before the cat was let out of the bag.

Again in the Brown negotiations, Ford, through Sweeney and O'Brien, coerced and interfered to prevent a transaction which was already executed by Pierce and which was favored by Brown, a highly respected, experienced Ford dealer. Ford argued that Brown, represented by able counsel, could not take care of himself pricewise. Ford's motives are obvious. They want to help the new man off to a flying start. The old has-been, no matter how many Fords he may have sold in the past, is coerced, pushed, and finally left to die on the vine when he stops fetching the bone for his master.

VI. Argument in Amplification of the Reasons Relied Upon for Granting the Writ of Certiorari

A. Unconstitutional Reexamination of the Facts by the Circuit Court of Appeals

This is the principal ground relied upon by the petitioners. The common law count was Count Two, for tortious interference with business expectancies. The verdict of the jury was general, but the appellate court correctly held that the verdict must be assumed to have been on the common law count because of the award of exemplary damages, not permitted on the statutory count. The Circuit Court states, "We agree with the district court's statement of the law applicable to count 2 * * * " Opinion, p. 2 (969). Then, after agreeing with the trial court on the law, and despite the fact that the jury not only found for the petitioners but found the facts and acts of Ford strong enough to award exemplary damages, the court professes to be able to find no evidence whatsoever to support the verdict. We submit that the Court of Appeals had absolutely no jurisdiction to reexamine the facts tried by a jury and come to an opposite conclusion. *Parson* v. *Bedford*, 23 U. S. 433, 3 Pet. 433, 7 L. Ed. 732 (1830); *Williamson* v. *Osenton*, 220 F. 653 (CCA W. Va. 1915); *Young* v. *Central R. Co.*, 232 U. S. 602, 34 S. Ct. 451, 58 L. Ed. 750 (1914); *Mutual Benefit Health & Accident Ass'n.* v. *Bowman*, 99 F. 2d 856, rehearing denied 306 U. S. 637, 59 S. Ct. 485, 83 L. Ed. 1038 (CCA Neb. 1939); *Lumberman's Mutual Casualty Co.* v. *Elbert*, 348 U. S. 48, 75 S. Ct. 151, 99 L. Ed. 59 (1954).

The jury had every right to interpret the ample evidence before it against Ford. There was abundant evidence including exhibits that Ford had an extremely close

connection with the New England Stock Control Company. For example, New England Stock Control used Ford employees to take their inventories, was managed by a former Ford official and took virtually all of the Ford inventories in New England. There was even the strange exhibit showing that New England Stock Control mailed out the inventory to Pierce in a Ford Division, Ford Motor Company envelope (Pl. Ex. 8). Further, the evidence demonstrated that the other appraisals ordered by Mr. Bemis and Mr. Pierce and taken by New England Stock Control Company were on a going concern basis and not a distress sale basis. Ford knew of this change of policy but Pierce did not. Ford's men knew and advised the prospects Cole and Ratti to purchase as fast as possible before Pierce found out about the low appraisal. New England Stock Control leaked information about the appraisal figures to Cole. Further, the conduct of Ford in influencing Brown, then a Ford dealer himself of high standing, sufficient economic resources, and fine character, and causing him, after a visit to Natick to completely change his mind about purchasing the stock of the company because the price, even though agreeable to him, was too high according to Ford, in and of itself constituted unjustifiable interference.

The evidence briefly touched upon above appears completely sufficient to support the verdict on the common law Count Two. We submit that the Circuit Court of Appeals has usurped the function of the jury and has in effect reexamined the evidence in reversing the verdict below on the facts without regard to law, all in violation of the Seventh Amendment.

B. Construction of the Automobile Dealer Suits Against Manufacturers Act

The appellate court dismisses the verdict of the jury and the arguments on appeal in a page and one-half of its printed Opinion (975-976). The Court discusses the law and the effect of "coercion" by either the dealer or the manufacturer under the definition to be found in 15 U. S. C., Section 1221 (e). The Court points out that "* * * a manufacturer may refuse to accept a person as a dealer because of an honest belief that the prospective dealer lacks either the ability or the financial resources to be a successful dealer." Opinion, page 976. The evidence shows that Brown was both able and had strong financial backing. The reason given by Ford in urging that Brown change his mind about buying into the dealership was because "the price was too high". We contend that under the circumstances, the price, as arrived upon by open negotiation between the parties is of no legitimate concern to the manufacturer. The Court emphasizes that the contract with Brown was expressly made subject to approval by Ford. Opinion, pages 970, 974, top of both pages. Reliance on this fact demonstrates completely the failure of the appellate court to correctly interpret the legislative history of this act, and to recognize the historical fact that this legislation was enacted in order to balance the extremely unequal bargaining position of the manufacturer and the dealer. *Barney Motor Sales* v. *Cal Sales, Inc.*, 178 F. Sup. 172 (D. C. Cal. 1959); 3 U. S. Code Congressional Administrative News, 84th Cong., 2d Sess., 4596 (1956). The letter addressed to Ford by Pierce on Ford's own printed form was obviously coercion in and of itself on the part of Ford intended to enable Ford to control the efforts of its dealer to sell its franchise and assets.

We submit that the appellate court erred in reversing the jury verdict under the statutory Count One in that there was ample evidence of "bad faith" and "coercion" to be found in the record, and that since no error in the court's charge or instructions in submitting the claim to the jury was found by the appellate court, this Court has again usurped the function of the jury in taking the action which it did.

C. Construction of Vermont Common Law of Unjustifiable Interference With Contractual Expectations

Finally, we return again to the appellate court's interpretation of Vermont common law. As pointed out previously in Paragraph A, on page 969 of its opinion the court agreed with the district court's statement of the law but disagreed that the evidence will support any recovery for tortious interference. Construing the evidence most favorably for the petitioners here, the history of the Cole, Ratti and Brown negotiations made out a proper case for the jury. In *Barney Motor Sales v. Cal. Sales, Inc., supra*, at page 174, the history of devices used by manufacturers to immunize themselves from suits by dealers is reviewed. The writer in Note, 70 Harv. L. R. 1239, 1239-1244 (1957) suggests that many courts have been too slow to recognize that auto franchise contracts ought not to be construed in accordance with strictly familiar contract principles because of the tremendous disparity of bargaining power between the manufacturerer and his dealer. This point is particularly applicable to the effect given the so-called letter of "intent to terminate" which Pierce had to sign in order to permit Ford to exercise approval or disapproval of Pierce's sale or transfer of its franchise. *See* Opinion, page 970.

The Vermont common law of tortious interference is most completely set out in *Mitchell* v. *Aldrich*, 122 Vt. 19, 163 A. 2d 833 (1960). On page 22 the Vermont court held that only *special* justification permits one to intentionally intrude to disrupt contractual relations, and on page 26 goes on to say that this intrusion may only be made when the intruder's interests are actually jeopardized, and that it has the burden of proof on this point. Above all, the Vermont court held that the questions of causation and justifiable interference are both for the jury. *Mitchell* v. *Aldrich*, *supra*, at page 27.

It is clear that the appellate court, having no quarrel with the district court's exposition of the law, has re-examined the facts and again usurped the function of the jury. We submit that the question must be resolved, both on constitutional grounds and ordinary principles of appellate law, on the basis of the evidence taken in the light most favorable to the petitioners. The jury not only found for petitioners but found the evidence strong enough to award punitive damages.

VII. Conclusion

The petitioners pray this Honorable Court to grant them a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit on the grounds previously stated. Petitioner Elmer W. Bemis, Trustee in Bankruptcy, wishes to point out that the civil action here was brought before the adjudication in bankruptcy, and therefore before he became a party to the action by order of the trial court. The creditors of Pierce Ford Sales, Inc., bankrupt, are in a perilous position if after successfully concluding their case against respondent in the trial court, the appellate court is permitted to re-examine the

facts and undo the findings of a jury of twelve men and women despite the existence of substantial evidence upon which the verdict was properly based.

Dated at Brattleboro, Vermont, this 19th day of May, A. D. 1962.

Respectfully submitted.

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"APPENDIX A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 6—September Term, 1961.

(Argued November 13, 1961 Decided February 5, 1962.)

Docket No. 26547

PIERCE FORD SALES, INC. and ELMER W. BEMIS,
Trustee in Bankruptcy,
Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY,
Defendant-Appellant.

Before:

SWAN, MOORE and SMITH,
Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Vermont, Ernest A. Gibson, *Judge.*

Ford Motor Company appeals from a judgment for plaintiffs upon verdict of a jury in an action to recover damages for wrongful interference with the disposal by

Pierce Ford Sales, Inc., of its dealership contract with Ford. Reversed.

FITTS & OLSON, Brattleboro, Vermont, *Attorneys for Appellant.* Whitney North Seymour (Simpson Thacher & Bartlett, New York 5, N. Y.) and Richard B. Darragh and Richard I. Fricke, Dearborn, Michigan, of Counsel.

A. LUKE CRISPE, Brattleboro, Vermont, *Attorney for Appellee, Pierce Ford Sales, Inc.* JOHN S. BURGESS, Brattleboro, Vermont, *Attorney for Appellee, Elmer W. Bemis, Trustee in Bankruptcy.*

SMITH, *Circuit Judge:*

This is an appeal by Ford Motor Company (Ford) from a judgment for Pierce Ford Sales, Inc. (Pierce) and its trustee in bankruptcy, in an action to recover damages for allegedly wrongful conduct by Ford which prevented Pierce from disposing of its dealership contract with Ford.[1] The amended complaint contains two counts, one based on the Automobile Dealer Suits Against Manufacturers Act, 15 U. S. C. A. 1221-1225; the other on the common law doctrine of unjustifiable interference with business expectancies. The case was tried to a jury, whose verdict awarded compensatory damages of $10,000, and exemplary damages of $13,850. Ford has appealed from the denial of its motions for a directed verdict and

[1] When the action was commenced in the summer of 1958 the plaintiffs were Pierce Ford Sales, Inc., a Vermont corporation, its receiver in bankruptcy, and three stockholders of the corporation. Subsequently the trustee in bankruptcy was substituted for the receiver, and the stockholder plaintiffs were dismissed as parties

for judgment notwithstanding the verdict. The order denying Ford's motion for judgment n.o.v. contains a brief opinion.[2]

Since the statutory cause of action (count 1) does not authorize punitive damages, and the jury was so charged, it is obvious that the verdict, at least insofar as it awarded exemplary damages, was rendered on the common law cause of action (count 2). That count will be first considered.

We agree with the district court's statement of the law applicable to count 2, but we cannot agree that the evidence will support any recovery by plaintiffs under that count. In considering the evidence the appellant concedes, as obviously it must, that the evidence must be viewed in the light most favorable to the plaintiffs. Consequently we shall accept the appellees' statement of the evidence whenever support for it appears in the record.

In 1952 Pierce acquired the Ford dealership for Brattleboro, Vermont. For several years the business pros-

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[2] The opinion reads in part as follows:

"The argument that the tort of interference with a business relationship applies only to already existing contracts must be denied. Intentional interference with contract negotiations or a business expectancy became a tort in English common law at least as early as 1793 when the landmark case of *Tarleton* v. *McGawley* was decided by the King's Bench. Section 766 of the Restatement of Torts states that 'one who, without a privilege to do so, induces or otherwise purposely causes a third person not to * * * (b) enter into * * * a business relation with another is liable to the other for the harm caused thereby.' The common law of nearby states makes the tort of interference with a business relationship applicable to contract negotiations. E.g., *Russell* v. *Croteau*, 98 N. H. 68, 94 A. 2d 376 (1953), and *Goldman* v. *Feinberg*, 130 Conn. 671, 37 A. 2d 355 (1944). Though there is no Vermont case in point, it is reasonable to conclude that were the Vermont Supreme Court faced with the question, it would follow the weight of authority and reason."

pered but later additional working capital was needed. In November 1957 Pierce requested Ford to assist in finding a person with adequate capital to become a part owner of Pierce, and was told that Ford would not do anything about getting people interested unless Pierce signed a form letter supplied by Ford giving notice of "intent to terminate" the dealership. Such a letter was executed about December 18, 1957. The letter provided that the dealership agreement should be terminated, if (1) Pierce sold its assets, and (2) Ford executed a dealership agreement with the purchaser. The letter also stated that "because of your legitimate concern with the character, ability and finances of dealers in your products, you have the right to decline, in your discretion, to enter a Sales Agreement with any person who may be willing to agree to purchase our assets."

The evidence concerns three negotiations of Pierce with prospective purchasers in none of which was a contract consummated. The first two negotiations involved the sale of Pierce's assets. The third involved the sale by stockholders of their stock in Pierce.

The first negotiation was with Calvin W. Cole. Mr. O'Halloran, a representative of Ford, indicated that Cole would be acceptable as a Ford dealer, and a contract was drafted, dated February , 1958, for the purchase by Cole of all Pierce's personal property, other than used cars, located upon its garage premises. The price was to be the fair market value of the property as determined by New England Stock Control Company (Control) of Milton, Massachusetts. Pierce expected Control's appraisal would be about $24,000. In fact it was substantially less. The contract was never signed, and the reason the deal fell through, as testified by Attorney Oakes, was because Pierce began negotiating with Mr. Ratti.

Mr. Pierce initiated negotiations with Mr. Ratti on February 6, 1958, the day before the agreement with Cole was to be signed. It was also before Mr. Pierce knew the amount of Control's appraisal. Mr. Ratti, Mr. Pierce and Mr. O'Halloran met at the Pierce plant. Mr. O'Halloran stated that he thought Mr. Ratti would be more acceptable to Ford than Mr. Cole, and doubted that Cole would be approved. As a result, Mr. Pierce "just forgot about" the Cole transaction. The three men then went to the office of Mr. Ratti's attorney, Mr. Gale, who prepared an agreement for the purchase by Ratti of Pierce's personal property. This also provided for appraisal by Control. In addition, Mr. Gale was to prepare a lease of the garage premises, which were owned by Mr. Pierce and his wife, and an option to buy the premises was to be agreed upon and signed by the parties. The next morning the parties met at Mr. Gale's office with Attorney Kristensen, who had been called in to represent Pierce. He advised Pierce not to sign, as he feared Pierce might become involved in a breach of contract suit with Cole. He testified also that O'Halloran and Ratti appeared to be putting pressure on to get the contract signed at once, and this made him refuse to let [redacted] go through so fast. The deal was dropped after Pierce learned the amount of Control's appraisal and would not sell at that figure.

From the foregoing statement of the evidence most favorable to the plaintiffs, we think it obvious that the jury could not properly find, under the common law theory of count 2, that Ford tortiously interfered with Pierce's business relations with either Cole or Ratti. Indeed, appellees' brief leaves us in doubt as to precisely what are Pierce's claims of wrongful interference. It seems to be suggested that Ford did wrong in refusing to assist in finding a purchaser until the "intention to terminate" the dealership was executed. But we know

of no common law doctrine which requires one party to assist the other to sell his assets in the absence of a contractual obligation to assist him. Another complaint seems to be that Ford ascertained from Control and disclosed to Cole that the amount of Control's appraisal would be less than Pierce expected. Such disclosure to Cole, if assumed to be true, despite Cole's testimony that he obtained the information directly from Control, would have made Cole the more willing to consummate the deal. The disclosure could not have caused damage to Pierce, unless it sold at the appraisal figure. It did not. Pierce itself terminated the negotiations with Cole in order to deal with Ratti. Apparently there is also a contention that Ford influenced Control to change its formerly used method of appraisal in order to produce a lower appraisal. We can find not even a scintilla of evidence that Ford had, or exercised, any influence over Control. Moreover, had Ford influenced the appraisal, this could not have damaged Pierce unless it sold at the lower appraisal. But by plaintiffs' own testimony Pierce broke off negotiations with Cole in order to deal with Ratti, delayed signing the Ratti contract on the advice of its attorney, and it was Pierce's own unwillingness to sell at Control's figures that prevented later resumption of the Cole or Ratti negotiations. Finally it seems to be urged that Mr. O'Halloran interfered by expressing the opinion that Ford would be more likely to approve a sale to Ratti than to Cole. Since Ford was to execute a dealership agreement with the purchaser and might, in its discretion, decline to do so, O'Halloran's expression of opinion cannot be deemed unlawful interference. With Ratti, as with Cole, non-consummation of the negotiations was caused by Pierce's unwillingness to sell its assets at Control's valuation.

After failure of the preceding negotiations, Pierce, its directors and stockholders began negotiations with Ray

Brown, the general manager of a Ford garage in Wilmington, Vermont. These negotiations resulted in a letter, dated March 8, 1958, addressed to Brown by Pierce's attorneys (Exhibit 15). The letter recites that the directors have offered to put Brown in charge of the entire business at a weekly salary of $150., and in addition to give him an annual bonus of 33⅓ per cent of the net corporate profits after taxes, which he was to use to purchase the 249 shares of stock presently outstanding. He was to put in immediately $5,000. to acquire 50 new shares of stock in order to provide new working capital for the corporation, which would also raise an additional $5,000. of working capital by a bank loan. The stockholders of the presently outstanding 249 shares would agree to sell their stock at $100. per share, and Brown would have 10 years in which to accomplish the purchase, dividends in the meantime to be distributed to the stockholders. Mr. and Mrs. Pierce, owners of the real estate on which the corporate operations were conducted, were to lease the premises to the corporation at $625. per month for a term of five years, with a five year renewal period at an adjusted rental. The letter concludes as follows: "Needless to say, our proposed arrangements are entirely conditioned upon approval of the Ford Motor Company, an approval which both we and you have been led to believe would be forthcoming as a result of your established reputation as a dealer in Wilmington." A copy of this letter was sent to Mr. Sweeney, who had succeeded Mr. O'Halloran as Ford's representative in the area, and Mr. Sweeney came to Brattleboro on March 19, 1958. He informed Pierce's attorney that Brown's character and ability made him acceptable as a Ford dealer but that the price was too high and therefore Sweeney would recommend to Ford disapproval of the contract. This resulted in a new contract being drafted, dated April 1, 1958 which reduced by $5,000. the price to

be paid by Brown, extended to 10 years his period of employment, and was slightly more favorable with respect to the terms of employment (Exhibit 16A). This contract was also expressly made subject to approval by Ford. Mr. Sweeney again indicated that the price was too high for Brown to operate successfully. After discussion with Mr. Sweeney's superior, Mr. O'Brien, Brown notified Pierce's attorney that he would not sign the agreement.

In the negotiations with Brown, representatives of Ford actively participated. They told him that the price was too high, and expressed the opinion that Ford would not grant him a dealership contract if he purchased on the proposed terms. The appellees contend that it was "none of Ford's business" what price Brown was to pay. We disagree. The greater the obligations he assumed, the greater the likelihood of his having future financial difficulties. Not only was the proposed contract expressly conditioned on Ford's approval but even without such a condition Ford would be justified in protecting its own interest to have a dealer financially sound. Under the common law doctrine, interference is actionable when one who, *without a privilege to do so*, purposely causes a third person not to enter into a business relation with another. Restatement of Torts §766. See also *A. S. Rampell, Inc.* v. *Hyster Co.*, 144 N. E. 371, 375 where the New York Court of Appeals states that "interference with pre-contractual relations is actionable where a contract would have been entered into had it not been for the malicious conduct of a third person." Certainly there was no evidence of malicious conduct by Ford's representatives. On the contrary Ford had a privilege to give the advice it gave. Moreover, such advice was not the proximate cause of Brown's failure to enter into the proposed contract. He testified that he made up his

own mind largely on the basis of the many repossessions with which Pierce dealership was afflicted.

We turn now to consideration of the statutory count. The evidence relied upon is the same as that recited in our discussion of the common law count. Section 1222 of Title 15 U. S. C. A. gives an automobile dealer the right to "recover the damages by him sustained * * * by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the francise or in terminating, canceling, or not renewing the franchise with said dealer * * *." Section 1221(e) defines what the Act means by good faith:

> "The term 'good faith' shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

The conduct which the statute proscribes is "coercion, intimidation, or threats of coercion or intimidation," and the Proviso is explicit that "recommendation, endorsement, exposition, urging or argument shall not be deemed to constitute a lack of good faith." Indeed, appellees' brief concedes that "good faith" is limited to acts of "coercion," and cites with approval Professor Kessler's discussions of Coercion in 66 Yale L. J. 1135 and 69 Yale L. J. 1.

Several district courts and one court of appeals have construed the statute and all recognize that there can be

no recovery by the dealer in the absence of coercion, intimidation or threats thereof by the manufacturer.[3] The legislative history of the Act is also enlightening.[4] Since, as shown by the House Report, the Act imposes no obligation to preserve an inefficient dealership it certainly imposes none to accept a dealership overburdened with liabilities at its inception. Hence a manufacturer may refuse to accept a person as a dealer because of an honest belief that the prospective dealer lacks either the ability or the financial resources to be a successful dealer. Thus Ford was under no obligation to give Brown a franchise loaded with repossessions and with long term liabilities for purchase of the stockholders' stock. And Ford's refusal to accept Brown could not be a breach of good faith as to Pierce.

No bad faith on the part of Ford or its employees is shown. It was not their conduct but that of Pierce itself which caused non-consummation of the negotiations with Cole and Ratti. In the case of Brown there is nothing which bears any resemblance to coercion or intimidation.

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[3] See *B. T. Woodard* v. *General Motors Corp.*, 5 Cir., ... F. 2d .... Jan. 11, 1961; *Staten Island Motors, Inc.* v. *American Motors Sales Corp.*, 169 F. Supp. 378, 382 (D. N. J. 1959); *Pinney & Topliff* v. *Chrysler Corp.*, 176 F. Supp. 801, 809-10 (S. D. Cal. 1959); *Barney Motor Sales* v. *Cal Sales, Inc.*, 178 F. Supp. 172 (S. D. Cal. 1959); *Leach* v. *Ford Motor Co.*, 189 F. Supp. 349 (N. D. Cal. 1960); *Blenke Bros. Motors, Inc.* v. *Chrysler Corp.*, 189 F. Supp. 420 (N. D. Ill. 1960).

See also Professor Kessler's discussions in 66 Yale L. J. 1135, at 1177-1180, and 69 Yale L. J., at 103-107.

[4] See House Report No. 2850, 84th Cong., 2d Sess. Vol. 3, p. 4596 at 4603:

> "The bill, however, does not prohibit the manufacturer from terminating or refusing to renew the franchise of a dealer who is not providing the manufacturer with adequate representation. Nor does the bill curtail the manufacturer's right to cancel or not to renew an inefficient or undesirable dealer's franchise."

Mr. Sweeney expressed the opinion that the price was too high for Brown to operate successfully. Such argument was within the permission of the Proviso to §1221(e), and Brown himself made his own decision and notified Pierce's attorney that he would not make the purchase.

A verdict for the defendant should have been directed, and the motion for judgment n.o.v. should have been granted. Accordingly the judgment is reversed and the cause remanded with direction to grant said motion. No appellate costs are awarded.